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**Order 2002-10-8**



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, DC**

Issued by the Department of Transportation  
on the **4<sup>th</sup> day of October, 2002**

**Served: October 4, 2002**

**U.S.-Vietnam Third-Country Code-Share Opportunity**

**Docket OST-2002-12496**

**FINAL ORDER**

**Summary**

By this order, we make final our tentative awards set forth in Order 2002-8-20, award American Airlines, Inc. (American) six weekly frequencies and United Air Lines, Inc. (United) one additional weekly frequency to conduct third-country code-share services between the United States and Vietnam, and grant American the necessary regulatory authority to perform its code-share services.<sup>1</sup>

**Background**

The March 2000 Memorandum of Discussion (MOD) signed by the United States and Vietnam provides that up to three cooperative marketing arrangements “between any number of U.S. airlines and any number of third-country airlines” may be authorized and that the code-share arrangements may serve between any points in the United States, on the one hand, and up to three Vietnamese points selected by the United States (via any intermediate points), on the other hand.<sup>2</sup> The MOD provides for a total of 21 weekly round-trip frequencies for use by U.S. carriers to offer these services.

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<sup>1</sup> Order 2002-8-20 noted that United already holds the underlying authority and does not need an exemption to conduct its proposed operations.

<sup>2</sup> The MOD states that the respective parties intend to allow third-country code sharing of passenger air transportation in the U.S.-Vietnam market (via intermediate points) on the basis of comity and reciprocity; the MOD does not contemplate direct service between the United States and Vietnam.

By Order 2001-8-21, the Department awarded Delta Air Lines, Inc. (Delta), Northwest Airlines, Inc. (Northwest), and United seven weekly frequencies each for U.S.-Vietnam third-country code-sharing services and granted the necessary regulatory authority for the carriers to conduct their respective code-share services.<sup>3</sup> Each allocation of frequencies was subject to a dormancy condition. Delta and United inaugurated service.<sup>4</sup> Northwest did not inaugurate its proposed services, and its seven frequencies reverted to the Department.

By Notice served June 13, 2002, the Department invited interested carriers to file applications for the available opportunity and frequencies, and American, Delta, Northwest, and United submitted applications for the authority. By Order 2002-8-20, the Department tentatively awarded American six weekly frequencies and United one additional frequency for U.S.-Vietnam third-country code-share services and proposed to award American the exemption authority needed to implement its proposed services.

### **Responses to Order 2002-8-20**

Delta, Northwest and United filed objections to Order 2002-8-20, American and United filed answers, and Delta filed a reply.<sup>5</sup> Each objecting carrier maintains that its proposal should have been granted over American's proposal. Northwest argues in particular that the Department selected American over Northwest entirely on the basis of American's more attractive elapsed times.

Each objecting carrier also argues that the Department's order places American in a position of holding two opportunities for U.S.-Vietnam service (a bilateral relationship with Vietnam Airlines and a third-country code-share designation with Japan Airlines). They argue that this situation will limit the ability of other carriers to enter the market, and they assert that the Department has not firmly committed to reevaluating American's award should American be in a position to commence code-share operations with Vietnam Airlines.

Delta, Northwest, and United all argue that, if American's award remains in place, it should be conditioned. Delta would limit American's award to not more than 179 days and would have the Department select a backup carrier, specifically Delta. United would limit an award to a period not to exceed twelve months. Northwest would have an award to American cause the immediate termination of American's relationship with Vietnam Airlines, thus enabling Vietnam Airlines to enter into a code-sharing relationship with another carrier.

In addition to the above matters, United specifically objects to a tentative award of six frequencies to American "for an indefinite term while limiting United to a single additional frequency,"<sup>6</sup> and it objects to the linkage of its one allocated frequency to American's

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<sup>3</sup> In last year's proceeding, Delta's code share partner was Société Air France (Air France); Northwest's partners were Malaysia Airlines (MAS) and KLM Royal Dutch Airlines (KLM); and United's partners were All Nippon Airways Co., Ltd., (ANA) Thai Airways International (Thai), and Lufthansa German Airlines (Lufthansa). Order 2001-8-21 also provided the carriers flexibility to allocate use of their frequencies among their various partners in that proceeding.

<sup>4</sup> Delta currently serves Ho Chi Minh City four times a week and Hanoi three times a week via Paris and Bangkok with Air France. United currently serves Ho Chi Minh City over Tokyo with ANA three times a week and over Bangkok with Thai four times a week.

<sup>5</sup> Delta's reply was accompanied by a motion to file, which we will grant.

<sup>6</sup> United Objections at 1.

allocation. United also requests clarification of the notification processes proposed in the order.<sup>7</sup>

In response, American argues that the three opposing carriers do not challenge the facts that American will be a new entrant into the U.S.-Vietnam market and that American will offer the traveling public the best round-trip elapsed times, with single-connection service from seven gateways to both Ho Chi Minh City and Hanoi via Tokyo. Rather, they all focus on American's announced code-share arrangement with Vietnam Airlines, which they contend should preclude a third-country award to American with JAL. American states that it is committed to its announced code-share relationship with Vietnam Airlines, is taking all appropriate measures to support its success, and "will proceed with implementation when a successful IASA review of Vietnam has been completed."<sup>8</sup> American maintains that the Department should reject the various proposals to condition its authority and should also reject Delta's backup award suggestion.<sup>9</sup>

In reply, Delta reiterates its proposals for limiting American's award to 179 days and for selecting a backup carrier. Moreover, it argues that the unique circumstances of this case merit the selection of a backup carrier.

### **Decision**

We will finalize our tentative decision in Order 2002-8-20, and award American Airlines six weekly frequencies and United Air Lines one additional frequency for U.S.-Vietnam third-country code-share services.

The 2002 Memorandum of Discussions between the United States and Vietnam provides valuable opportunities for three U.S. carriers to operate third-country code-share services between the United States and Vietnam. Currently, there are two carriers providing such services (Delta and United).

By Order 2002-8-20, we stated our tentative belief that it was important to promote to the greatest degree possible multi-carrier competitive services in the market and to select a carrier whose proposal would enhance public benefits, and that our selection of American best met those objectives. We tentatively found that American would be a new entrant in the market that would enhance competition by offering the best elapsed times with single-connection service from seven U.S. gateways to both Ho Chi Minh City and Hanoi via Tokyo. While we noted that American would use only six of the available frequencies, we stated that in awarding United, the only carrier to offer a proposal for the remaining single frequency, the public interest would be served by the use of all available frequencies for U.S. carrier services in the market.

We recognized that Northwest also would be a new entrant, but noted that "its proposed services generally would involve such lengthy elapsed times, as well as multiple connections," and that

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<sup>7</sup> We address this matter in a section on procedural issues at the end of this order.

<sup>8</sup> American Answer at 3 and 6. "IASA" refers to the Federal Aviation Administration's International Aviation Safety Assessment program (see Order 2002-8-20 at 3).

<sup>9</sup> United also opposes Delta's backup proposal and notes that should the Department adopt such an approach, the Department would be required to allow parties to comment and to issue yet another show-cause order for this proceeding.

we tentatively did not believe its selection would best serve the public interest.<sup>10</sup> We stated that we did “not believe providing Delta and United with a further opportunity to provide third-country code-sharing in the U.S.-Vietnam market outweighs providing American with its first such opportunity...and providing the traveling public with an additional competitive choice for these services.”<sup>11</sup>

No party has presented evidence to alter our tentative conclusions and awards in this proceeding.

The three carriers objecting to our selection of American have urged that we place conditions on American’s award related to an announced code share with Vietnam Airlines. In our show-cause order, we made clear that if we selected American, and “should it commence code sharing with Vietnam Airlines we could reevaluate any award it might have received here.”<sup>12</sup> We still regard this approach as appropriate and sufficient. However, having taken into account the concerns raised by the commenting parties, we may find that circumstances at the time warrant reevaluating our award here prior to implementation of, but after application and receipt of regulatory authority for, an American Airlines-Vietnam code share.<sup>13</sup>

Contrary to United’s assertion, we have not proposed granting American indefinite authority. In fact, our show-cause order proposed to grant American a two-year exemption, similar to that granted carriers in last year’s proceeding. We see no need to alter that duration here. As for de-linking United’s frequency from the allocation to American, our order specifically and intentionally linked the awards for American’s six frequencies and United’s one frequency, for possible reevaluation. We did so after United itself suggested such an approach: “United would accept the same time limits as are applied to any allocation to American so that there would be seven frequencies available for re-evaluation once the FAA’s IASA review of Vietnam had been successfully completed. This would allow the award of enough frequencies to enable the operations of a daily pattern.”<sup>14</sup> We see no reason to change the approach here.

We do not agree with Delta that we need to make a backup award in this proceeding. We believe that our long-standing procedure of relying on our standard dormancy condition in cases such as this gives us the tools necessary to ensure that should a carrier not use its allocated frequencies, we can assess the situation and move quickly to award those frequencies to another carrier.

## **Procedural Issues**

United requests clarification of language in footnotes 15 and 17 of Order 2002-8-20, which United calls an “apparent inconsistency.” Both footnotes are designed to give United the same flexibility afforded it in the previous proceeding so that United may use the frequency allocated among its various partners; however, the Department here, as well as before, requires that there

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<sup>10</sup> Order 2002-8-20 at 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> At this time there is not an application before the Department of Transportation by either American or Vietnam Airlines for authority to conduct code-share operations. Assuming the FAA proceeds under normal procedures, it would not undertake its IASA review of Vietnam until an application seeking authority for Vietnam Airlines were submitted.

<sup>14</sup> Consolidated Reply of United, July 19, 2002, at 7.

be advance notification of change of partner and change of point. Both United and Northwest in the previous proceeding had multiple partners, and we devised the system whereby the carriers would have route flexibility among those partners. United in the previous proceeding also wanted flexibility to use its allocated seven frequencies at various points (*i.e.*, United had there proposed services to Ho Chi Minh City, Hanoi, and DaNang). The language in footnotes 15 and 17 was designed to afford United the same flexibility that it had in the earlier proceeding.<sup>15</sup> The language regarding partners is not applicable to American, since American only has one code-share partner at issue in this proceeding; however, if American changed its distribution of frequencies, it also would need to notify us.

We also want to clarify an apparent misunderstanding in the pleadings in this case. Northwest and United suggest that Delta is free to move its frequencies to a different code-share partner than the partner in the previous proceeding. Such is not the case. The flexibility afforded carriers in the previous proceeding was only for those carriers who had multiple partners in that proceeding. (See footnote 14 of Order 2001-8-8.) Since Delta only had one code-share partner in that proceeding and its frequencies were specifically allocated for service with that partner, Delta would need to seek authority to switch its allocated frequencies from Air France to another code-share partner if it chose to do so.

**ACCORDINGLY,**

1. We make final our tentative findings and conclusions in Order 2002-8-20;
2. We grant American Airlines, Inc. for a period of two years from the date of issuance of this order, an exemption under 49 U.S.C 40109 to conduct foreign air transportation of persons, property, and mail, between the United States and Vietnam;
3. We grant American the right to integrate the authority awarded here with American's certificates of public convenience and necessity, subject to the condition that such operations are consistent with the applicable bilateral aviation agreements. Furthermore, (a) nothing in the award of the route integration authority requested should be construed as conferring upon American additional rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless American first notifies the Department of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in American's authority by virtue of route integration authority granted here, but that are then not being used by American, the holding of such authority by route integration will not be considered as providing any preference for American in competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue;
4. We allocate American Airlines, Inc. six weekly frequencies and United Air Lines, Inc. one weekly frequency for third-country code-sharing services in the U.S.-Vietnam market;<sup>16</sup>

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<sup>15</sup> See Order 2001-8-8 at 4 and at 5, note 14, as well as Order 2001-8-21 at 2.

<sup>16</sup> Inasmuch as there is no agreed designation provision between the United States and Vietnam, no formal designations will be required here. However, we will notify the Vietnam Government through diplomatic channels of our determinations in this proceeding.

5. The frequency allocated in ordering paragraph 4 to United Air Lines shall not be restricted as to code-sharing partner and/or routing, but shall be subject to all of the standard conditions placed on code-sharing authority (*e.g.* 30-day advance notification of points to be served), as well as a 30-day advance notification or separate authorization of the code-share partner for the services offered, as applicable;<sup>17</sup>
6. The frequencies allocated in ordering paragraph 4, above, shall be subject to the Department's standard dormancy condition wherein the frequencies will automatically return to the Department for reallocation, should the frequencies not be operated for a period of 90 days;<sup>18</sup>
7. We grant the motion of Delta Air Lines, Inc. for leave to file an otherwise unauthorized document;
8. To the extent not granted, we deny the applications in Docket 2002-12496; and
9. We will serve this order on American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., Japan Airlines Company, Ltd.; Société Air France; Malaysia Airlines; KLM Royal Dutch Airlines; All Nippon Airways; Thai Airways International; Lufthansa German Airlines; the Ambassador of Vietnam in Washington DC; the Federal Aviation Administration; and the U.S. Department of State (Office of Aviation Negotiations).

By:

**SUSAN McDERMOTT**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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<sup>17</sup> We would consider the notification requirement satisfied as to the points and partners stated in the application in this proceeding. New service points and the addition of code-share partners would require notification or a separate application for a statement of authorization, if necessary. Since American's application includes only one code-share partner, American would be required to file new applications for additional partners.

<sup>18</sup> Carriers would be required to notify the Department of a decision not to operate the frequencies within ten days of such a decision. The dormancy period for the frequencies allocated in this proceeding will begin on the date of service of this order.